Supreme Court, U. S.
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IN THE

# SUPREME COURT

## OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,

*Petitioner,*

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,

*Respondents.*

**RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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Respondent, Pacific Power and Light Company, a Maine corporation, respectfully urges this Court to deny the Petition for Writ of Certiorari.

### QUESTION PRESENTED

Whether, as respects the Pacific Power and Light Company, any reason whatsoever exists for the United States Supreme Court to review the decision of the United States Court of Appeals for the Ninth Circuit.

### STATEMENT OF THE CASE

On July 13, 1973, David Quedens, represented here-

in by his mother and guardian ad litem, the petitioner John E. Helm, was severely injured when he simultaneously touched uninsulated high voltage power wires while performing tree-trimming work. At the time and place of the accident, David Quedens was employed by Davey Tree Expert Company (Davey Tree) and was performing work pursuant to a contract between Davey Tree and the Idaho First National Bank (the bank). The contract called for Davey Tree to trim trees on and adjacent to a vacant lot on which the bank was to construct a new branch office. (R. 398,414)

Quedens had been employed previously by Davey Tree between May and September, 1971, as a tree trimmer, and also had prior experience as a tree trimmer in California. (R. 96:19) During his employment with Davey Tree in 1971, Quedens was a member of a tree trimming crew whose exclusive function was to trim trees along utility power lines. Weekly safety meetings for the benefit of the crew members were conducted and it was stressed in these meetings that the mobile boom and bucket used in the work should never be positioned closer than 6 feet from any power lines. (R. 597-99) After two years of service in the military, Mr. Quedens returned to Davey Tree in March, 1973 and worked as a foreman.

The agreement between the bank and Davey Tree was in the form of an acceptance of a bid submitted by Davey Tree. The bid was prepared by Mr. James Marria, then a sales representative for Davey Tree, in the latter part of June, 1973. In order to bid the job, Mr. Marria and Mr. Quedens traveled to Sandpoint, Idaho to view the site. Quedens' attention was called specifically to the three power lines over and above the trees to be trimmed and he was reminded not to get the boom and bucket closer than 6 feet to the power lines. (R. 597-99)



Much of the trimming was to be done from a bucket which was at the end of a hydraulically extended mobile power and mounted on a truck and manufactured by Mobile Aerial Towers, Inc. Several decals warning of the dangers of high voltage power lines were conspicuously located on the boom assembly and inside the cab of the truck used by Quedens at the time of the accident. (Marria depo. 44, 45: 15-25, 83:21, Exhibit 6). These warnings were easily observable at the time of the accident. (Sharp depo. 93:23-25)

On the day of the accident, Quedens was trimming trees from the bucket. The bucket had controls to operate the boom. There was also a control panel in the truck to lower the boom in case of emergency. Quedens had trimmed two sides of the trees from the inside and had then moved the truck to the adjoining street, approximately 15 feet from the tree he was about to trim. (Sharp depo. 56:9, 59:13, 101)

The power lines in question were owned, operated and maintained by Pacific Power and Light Co. A

three wire set ran north and south above the trees being trimmed. Another three wire set, called a tap line, ran perpendicularly across the street from a cafe and intersected the line running north and south. The height of the tap line was 39 feet above street level. (R. 415-17)

Late in the afternoon, following an exchange of tools between the two men, Quedens positioned the bucket over the street to the rear of the truck. (Boyle Depo. 9:15, 12:11) Quedens then raised the boom to a height which resulted in the bucket being positioned approximately 1 foot below and between two wires of the three wire tap line. The wires passed on both sides of Queden at approximately the level of his waist. (Sharp depo. 63:6, Boyle Depo. 23:22-24:3) Quedens raised his hands and arms above the wires and appeared to be shouting or talking to Sharp on the ground. Quedens was looking right down the wires when he yelled at his partner and must have seen them. (See footnote 1 to the Order Denying Petition for Rehearing, Appendix D.) Quedens then suddenly dropped his arms to both sides and both hands touched the wires, resulting in the injuries sustained. At the time of the contact the bucket was positioned over the street and 15-20 feet away from the closest limb. (Boyle depo. pages 66-67); Sharp Depo. page 59:22-24) The photographic exhibits admitted at the hearing on the summary judgment motions clearly depict that the power lines ran some distance above the tops of the trees.



Petitioner brought suit against defendants Pacific Power and Light Co., Mobile Aerial Towers, Inc. and the Idaho First National Bank in the United States District Court for the District of Idaho. Upon motions by the defendants for summary judgment, oral argument was presented to the District Court. After careful consideration, the District Court granted the motions and entered judgment for all defendants. The petitioner filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit and also filed a Federal Rules of Civil Procedure 60(B) motion to the District Court, which was denied. On November 30, 1978, the United States Court of Appeals for the Ninth Circuit entered its memorandum opinion affirming the District Court's judgment in all respects. Petitioner filed a petition for rehearing on January 8, 1979, and on February 26, 1979, the United States Court of Appeals for the Ninth Circuit denied the petition. The District Court Memorandum Decision and Order and the Court of Appeals Memorandum Decision and its Order Denying the Petition for Rehearing have been set forth in the Appendix to the Petition for Writ of Certiorari.

## REASONS FOR DENYING PETITION

It is recognized in the Supreme Court rules by Rule 19 that a review on Writ of Certiorari is not a matter

of right, but of sound judicial discretion and will only by granted where there are "special and important reasons thereof." There are enumerated certain reasons which by indication of character emphasize the type of issues which may be examined. Conflicts of decisions between courts of appeal, conflicts between courts of appeal and applicable decisions of the Supreme Court and/or a decision on an important federal question which should be settled by the Supreme Court, are all examples of "special and important reasons" for exercise of the judicial discretion of certiorari.

The instant petition for Writ of Certiorari fails to comply with Supreme Court Rules 19 and 23. Additionally petitioner's italicized argument that the decisions of the District Court judge and the Ninth Circuit Court of Appeals: ' . . . make a mockery of justice . . .' (Petitioner's Brief page 27) runs the risk of violation of Supreme Court Rule 40 in being a scandalous allegation which should only merit it being immediately stricken by the Court.

The District Court and the Court of Appeals have twice reviewed the petitioner's arguments and have in each instance found no question of material fact existent on any relevant issue. In such circumstances on motion for summary judgment there is, of course, no right to jury trial.

At very best petitioner indicates only an issue of



importance between the parties and of no real importance to the public. Such a contention consistently fails to merit the granting of a writ of certiorari. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, (Iowa, 1955) 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897. Indeed petitioner has totally failed to cite one credible "special and important reason" for granting review of Writ of Certiorari.

The District Court on two occasions and then the Ninth Circuit Court of Appeals on two occasions found ample support for Pacific Power and Light Company's motion for summary judgment in the decision of *Probart v. Idaho Power Company*, 74 Idaho 119, 258 P.2d 361 (1953). Petitioner makes no assertion that *Probart* in any way decides an important federal question, reflects a conflict between state and federal law, or that reliance upon it creates a conflict between the Circuits. Instead petitioner urges, for at least the fifth time, that the case is distinguishable. This argument has continually been found lacking merit in legal analysis and support in fact. Although power companies have the highest duty of care, *Probart*, *supra*, they are not insurers of those working near such transmission lines nor are they required to anticipate or foresee the remotest possibilities. *Clough v. New England Tel. & Tel. Co.*, 172 N.E. 2d 113 (Mass. 1961); *Manaia v. Potomac Electric Power Co.*, 268 F.2d 793 (4th Cir. 1959), cert. den., 80 S.Ct. 255.

## CONCLUSION

When there is no genuine issue as to any material fact the moving party is entitled to a judgment as a matter of law. As to respondent Pacific Power and Light, the facts and law presented to both the District Court and Ninth Circuit Court of Appeals warranted dismissal of the complaint by summary judgment. Furthermore, the petition has totally failed to meet the criteria or considerations governing a review on certiorari.

We respectfully pray that the petition be denied.

DATED: July 5, 1979.

CUTLER W. HALVERSON
*Counsel for Pacific Power and Light Co., Respondent*